

Memorandum
Fair Political Practices Commission

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, and Remy

From: Scott Hallabrin, General Counsel
Lawrence T. Woodlock, Senior Commission Counsel

Subject: Pending Litigation

Date: February 3, 2009

1. *California ProLife Council, Inc. v. Karen Getman, et al.*

This action challenged the Act's reporting requirements for express ballot measure advocacy. In 2000, the Federal District Court for the Eastern District of California dismissed certain counts and granted the FPPC's motion for summary judgment on the remaining claims. The Ninth Circuit Court of Appeal agreed that the challenged statutes and regulations were not unconstitutionally vague, and that California may regulate ballot measure advocacy if it can show a sufficient state interest for its rules. The Ninth Circuit remanded the matter to the district court to determine whether California could establish an interest sufficient to support its disclosure rules, and that those rules are properly tailored to that interest.

On February 22, 2005, the district court granted defendants' motion for summary judgment on those questions. Plaintiff again appealed. The Ninth Circuit heard oral argument on February 12, 2007. On November 14, 2007, the court released its opinion under the name *California ProLife Council, Inc. v. Randolph*, finding that California had established its compelling interest in disclosure of the sources of funds used to make independent expenditures supporting or opposing ballot measures. The court did find, however, that when the entity making such expenditures was a multi-purpose non-profit group organized as a Section 501(c)(4) corporation, which did not make expenditures or contributions towards the election or defeat of candidates, the Commission failed to demonstrate how the ancillary rules involving registration as a recipient committee were sufficiently tailored to support California's compelling interest in disclosure. The Ninth Circuit remanded the case to the trial court without further instructions. The parties submitted proposed judgments and further briefing at the trial court's order. The court then entered an order and final judgment in the case, finding that plaintiff had prevailed on one of its ten claims, and entering judgment enjoining the Commission from imposing on plaintiff and similar groups the ancillary recipient committee rules referenced in the Ninth Circuit's opinion.

The Commission had anticipated this judgment, and in December 2007 adopted Emergency Regulation 18413 to comply with the Ninth Circuit's ruling. Plaintiff then moved to recover in attorneys' fees and costs under 42 U.S.C. Section 1988. On September 30, 2008, the court awarded plaintiff partial attorneys' fees. Plaintiff then appealed, and the Attorney General

filed a cross-appeal. The Ninth Circuit scheduled these appeals for a mediation assessment conference on February 2, 2009. Following that conference, the defendants agreed to submit their monetary demands to the mediation office on February 26, 2009, to facilitate further proceedings. The first round of briefing on appeal has accordingly been continued to March 30, 2009.

2. *ProtectMarriage.Com, et al. v. Bowen, et al.*

This action was filed on January 9, 2009, in the United States District Court for the Eastern District of California by plaintiffs ProtectMarriage.com - Yes on 8, a Project of California Renewal and National Organization for Marriage California - Yes on 8, Sponsored by National Organization for Marriage. It is a “defendants class action” lawsuit against defendants responsible either for enforcement of the Act, or maintenance and publication of the campaign reports at issue in this case (including the Commission, Attorney General, Secretary of State and various district and city attorneys). The Commission defendants were formally served on January 14, 2009.

Plaintiffs challenge the Act’s campaign disclosure requirements on contributions to ballot measure committees as unconstitutional. They cite a variety of adverse actions against persons who supported Proposition 8, which was on the November 2008 ballot, alleging that some of these persons were identified through campaign contribution information made public as required by the Act’s campaign reporting and disclosure provisions. The Complaint seeks to permanently enjoin the future disclosure of all of plaintiffs’ contributors, expunge the records of all of plaintiffs’ past contributors, and to invalidate as unconstitutional the Act’s \$100 disclosure threshold for contributors to ballot measure committees, the Act’s requirement for post-election disclosure of contributors to ballot measure committees, and the Act’s failure to purge the records of contributors to ballot measure committees after the election. In all counts, plaintiffs seek declaratory and injunctive relief, and an award of attorney’s fees.

Plaintiffs moved for a preliminary injunction on shortened time, which was heard on January 29, 2009, before District Judge Morrison C. England, Jr. The court denied plaintiffs’ motion from the bench, concluding that plaintiffs had failed to demonstrate the probability of success on the merits or the likelihood of irreparable injury necessary to support a preliminary injunction. The court issued a written order to this effect on January 30. On February 3, 2009, the Commission defendants timely filed their Answer to Plaintiffs’ Second Amended Complaint.